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No. 87-1707

In the Supreme Court of the United States

OCTOBER TERM, 1988

FREDERICK C. STAUBER, PETITIONER

v.

RICHARD A. CLINE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether respondents, a group of National Guard technicians, were engaged in activity incident to their military service and are, on that account, immune from a fellow technician's state law tort action for intentional infliction of emotional distress.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 837 F.2d 395. The opinion of the district court (Pet. App. 14a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1988. The petition for a writ of certiorari was filed on April 15, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a former National Guard technician, seeks review of a court of appeals' decision affirming a district court's post-trial dismissal of petitioner's state law tort suit alleging that his fellow employees engaged in intentional infliction of emotional distress.

1. The National Guard Technicians Act of 1968, 32 U.S.C. 709 (the Act), authorizes the Secretary of the Army and the Secretary of the Air Force to hire technicians for "the administration and training of the National Guard" and the maintenance and repair of supplies issued to the National Guard or the armed forces" (32 U.S.C. 709(a)). It specifically requires that a technician "shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position" (32 U.S.C. 709(b)). The Act further provides that if a technician is separated from the National Guard or ceases to hold the military grade specified for his position, he promptly shall be separated from his employment (32 U.S.C. 709(e)(1)). The Act sets forth other bases for separation and other provisions governing the employment relationship (32 U.S.C. 709(e) through (h)).

Petitioner and respondents were maintenance and repair technicians hired under the National Guard Technicians Act and assigned to the 297th Infantry Group of the Alaska Army National Guard. They worked at a military installation under the direct command of a full-time, uniformed, United States Army lieutenant colonel (Pet. App. 3a-4a, 21a). Respondent Cline, who held the rank of chief warrant officer, was petitioner's immediate supervisor, while respondents Sharper and Dugan were coworkers, superior in rank to petitioner. Their work consisted of maintaining and repairing the Infantry Group's vehicles and equipment (Pet. 7; Pet. App. 4a).

2. In 1983, petitioner filed this action in Alaska state court alleging that respondents had subjected him to various state law torts, including intentional infliction of emotional distress. He contended that respondents harassed and intimidated him, while at work and to some extent off base, with the use of horns, sirens, and noisemakers; that respondents sabotaged his work area by removing and

rearranging tools; that they refused to give him keys to the common work area; and that they taunted him and threatened to give him bad work reviews so that he would be fired (Pet. App. 4a). The United States Attorney assumed representation of respondents and removed the action to federal district court pursuant to 28 U.S.C. 1442. The case was tried and a jury returned a verdict awarding petitioner compensatory and punitive damages. Pet. App. 4a-5a.

Following trial, respondents moved to dismiss the action on the ground (among others) that they were immune from state law tort claims under the principles of intramilitary immunity set forth in *Feres* v. *United States*, 340 U.S. 135 (1950). The district court concluded that the work performed by petitioner and respondents as National Guard technicians "was beyond any question incident to military service" and that the "*Feres* doctrine therefore applies, and [respondents] are immune from suit" (Pet. App. 22a). The district court accordingly set aside the judgment and dismissed petitioner's complaint (*id.* at 24a).

The court of appeals affirmed (Pet. App. 1a-13a). The court acknowledged that this case, unlike *Feres*, is not an action against the United States (Pet. App. 7a-8a), but nevertheless concluded that *Feres* principles precluded petitioner's common law tort suit for damages against fellow National Guardsmen (*id.* at 7a, 12a).[1] The court of appeals concluded that the nature of the technicians' work was an integral part of routine military activities and was

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[1] The court of appeals rejected petitioner's argument that respondents' post-trial invocation of the *Feres* defense came too late and constituted a waiver of the defense (Pet. App. 6a-9a). The court of appeals characterized the defense as "comparable to a restriction on subject matter jurisdiction," and thus found it unwaivable (*id.* at 8a). Petitioner has not raised the waiver question in his petition to this Court. See note 4, *infra*.

subject to military command structures and military discipline (*id.* at 11a-12a). The court of appeals therefore rejected petitioner's argument that the work was essentially civilian and outside *Feres'* scope (*id.* at 9a-12a).

ARGUMENT

Petitioner contends that the court of appeals erred in affirming the district court's dismissal of his state law tort action against his National Guard co-workers. We submit that while the court of appeals' characterization of the *Feres* doctrine is not precisely accurate—for reasons other than those suggested by petitioner—the court's result is nonetheless correct and consistent with the decisions of this Court and the other courts of appeals. There is, accordingly, no warrant for further review.

1. The federal courts have repeatedly recognized a bar to tort suits of various kinds, based on the existence of a military relationship and the fact that the suit arises from activities incident to military service. This Court held in *Feres* v. *United States,* 340 U.S. 135 (1950), that the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, does not waive the government's immunity from serviceman tort suits that "arise out of or are in the course of activity incident to service" (340 U.S. at 146). See also, *e.g.*, *United States* v. *Johnson*, No. 85-2039 (May 18, 1987), slip op. 4; *United States* v. *Shearer*, 473 U.S. 52, 57 (1985). As the Court has explained, "a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission" (*Johnson*, slip op. 9 (footnote omitted)), and such claims, if generally permitted, " 'would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness' " (*ibid.* (citation omitted)). The Court has applied the same

reasoning in third-party indemnity suits against the government, reasoning that "where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party." *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977).

In a similar vein, this Court held in *Chappell* v. *Wallace*, 462 U.S. 296 (1983), that "enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations" (*id.* at 305 (footnote omitted)). The Court explained that "[a]lthough this case concerns the limitations on the type of nonstatutory damages remedy recognized in *Bivens* [v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)], rather than Congress' intent in enacting the Federal Tort Claims Act, the Court's analysis in *Feres* guides our analysis in this case" (462 U.S. at 299). "Here, as in *Feres*, we must be 'concern[ed] with the disruption of "[t]he peculiar and special relationship of the soldier to his superiors" that might result if the soldier were allowed to hale his superiors into court' " (*id.* at 304 (citations omitted)). See also *United States* v. *Stanley*, No. 86-393 (June 25, 1987).

Most recently, this Court held in *Boyle* v. *United Technologies Corp.*, No. 86-492 (June 27, 1988), that a military contractor is immune, in certain circumstances, from a service member's state law tort suit based on design defects in military equipment (slip op. 11). The Court observed that it had developed federal common law to displace state law in cases of peculiarly federal concern, such as cases involving the interpretation of government contracts (*e.g.*, *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973)) and the civil liability of federal

officials for actions taken in the course of their duty (*e.g.*, *Barr* v. *Matteo*, 360 U.S. 564 (1959)). The Court concluded that state laws imposing civil liability in the military contractor context similarly conflict with a "uniquely federal interest" associated with military procurement (*Boyle*, slip op. 6) and the need for government discretion in "the selection of the appropriate design for military equipment to be used by our Armed Forces" (*id.* at 10).

This case presents an instance of intramilitary immunity that is related to, but ultimately distinct from *Feres, Chappell,* and *Boyle*; namely, whether military service members, acting incident to service, are immune from state law tort suits by fellow service members. This Court has always assumed such immunity to exist. See *Feres*, 340 U.S. at 141 ("We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." (footnote omitted)).[2] The lower courts have uniformly held that service members are immune from such suits for actions incident to their military service, whether based on intentional or negligent conduct. See, *e.g.*, *Holdiness* v. *Stroud*, 808 F.2d 417, 426 (5th Cir. 1987); *Bois* v. *Marsh*, 801 F.2d 462, 471 (D.C. Cir. 1986); *Trerice* v. *Pedersen*,

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[2] The *Feres* decision contains (340 U.S. at 141 n.10) a marginal citation to *Dinsman* v. *Wilkes*, 53 U.S. (12 How.) 390 (1852), distinguishing that case as involving an intentional tort. In *Dinsman*, this Court permitted a marine to bring an action against his commanding officer for damages resulting from a detention and flogging. See also *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849). This Court further distinguished *Dinsman* in *Chappell*, noting that "since the time of *Wilkes*, significant changes have been made establishing a comprehensive system of military justice" (462 U.S. at 305 n.2). See *Trerice* v. *Pedersen*, 769 F.2d 1398, 1403-1404 (9th Cir. 1985). Furthermore, it is unclear from the *Wilkes* decision whether federal or state common law was involved in that case.

769 F.2d 1398, 1403-1404 (9th Cir. 1985); *Trerice* v. *Summons*, 755 F.2d 1081, 1084-1085 (4th Cir. 1985); *Jaffee* v. *United States*, 663 F.2d 1226, 1234-1235 (3d Cir. 1981) (en banc), cert. denied, 456 U.S. 972 (1982); *Hefley* v. *Textron, Inc.*, 713 F.2d 1487, 1490-1492 (10th Cir. 1983); *Rotko* v. *Abrams*, 338 F. Supp. 46, 48 (D. Conn. 1971), aff'd per curiam, 455 F.2d 992 (2d Cir. 1972). See also *Fountain* v. *United States*, 533 F. Supp. 698, 703 (W.D. Ark. 1981); *Kennedy* v. *Maginnis*, 393 F. Supp. 310, 311-312 (D. Mass. 1975). This immunity rests on the longstanding recognition that a member of the federal armed forces, even more than a civilian federal official (see *Barr* v. *Matteo, supra*), is entitled to immunity from state civil liability for actions taken incident to his service.[3]

A serviceman's immunity from state tort actions protects the same governmental interests implicated in *Feres*, but is analytically distinct and actually predates that case. We believe that the court of appeals spoke somewhat imprecisely in relying on the "*Feres* doctrine" as a bar to state tort suits against individual service members arising incident to service. Regardless of the label, however, petitioner does not dispute the existence of this immunity. The only question he presents is whether respondent National Guard technicians' activities are sufficiently related to military service to permit them to invoke that immunity in this case. See Pet. ii.[4]

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[3] The Ninth Circuit has consistently recognized this immunity for at least 20 years. See *Pedersen*, 769 F.2d at 1403; *Mollnow* v. *Carlton*, 716 F.2d 627, 628 (1983), cert. denied, 465 U.S. 1100 (1984); *Mattos* v. *United States*, 412 F.2d 793, 794 (1969); *Bailey* v. *Van Buskirk*, 345 F.2d 298, 298 (1965), cert. denied, 383 U.S. 948 (1966).

[4] Petitioner does not challenge the court of appeals' conclusion that respondents here were entitled to invoke their immunity from common law suits following trial. See Pet. App. 6a-9a. We note that respondents did move to dismiss this action on federal immunity grounds prior to trial, citing a federal officer's immunity, under *Barr*

2. The court of appeals and the district court correctly concluded that the dispute between the National Guard technicians in this case arose incident to military service and that respondents therefore were immune from civil liability under state law. That factbound determination does not conflict with any decision of this Court or another court of appeals and does not warrant further review.

An Army National Guard technician is a civilian employee of the Army for purposes of applicable wage scales and employment and retirement benefits. But the technician performs an essentially military mission. He is required to be a service member and must hold a military grade specified by the Secretary of the Army for his position (32 U.S.C. 709(b)). He is subject to mandatory removal if he is separated from the service or ceases to hold the military grade specified for his job responsibilities (32 U.S.C. 709(e)(1)). Furthermore, he is not covered by various statutory provisions applicable to the general civil service work force, including provisions governing reduction in work force, removal or adverse action (32 U.S.C. 709(e)(4)-(6) and (f)-(g)). Thus, the courts of appeals have recognized the important military dimension of a National

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v. *Matteo, supra,* from common law suits. See C.R. 6, Memorandum in Support of Motion to Dismiss (filed Mar. 2, 1984), at 4-8. The memorandum in support of the motion to dismiss did not mention *Feres* or cite the court of appeals cases, cited above, that recognize a military service member's closely related (but substantially broader) immunity from common law tort suits. We nevertheless believe that the motion and supporting memorandum sufficiently raised the question of immunity to permit the district court to revisit that question and consider additional authority, involving military service members, following trial. In any event, the question whether respondents' motion to dismiss was timely under these circumstances is not sufficiently important and does not arise with sufficent frequency to warrant this Court's review.

Guard technician's on-the-job activities. See *Martelon* v. *Temple*, 747 F.2d 1348, 1351-1352 (10th Cir. 1984) ("The legislative history of the Act shows that Congress considered that the military mission of the technicians was paramount and that the technician's duties were inseparable from his or her military obligations."), cert. denied, 471 U.S. 1135 (1985); *NeSmith* v. *Fulton*, 615 F.2d 196, 201 (5th Cir. 1980) ("Moreover, one of the express purposes of the National Guard Technicians Act was to 'recognize the *military characteristics* of the National Guard' by requiring civilian technicians to be military members of the National Guard and by providing for their supervision by the adjutants general pursuant to regulations prescribed by the secretary of the relevant military department." (emphasis in original; citation omitted)).

That conclusion is certainly true with respect to the particular technicians in this case. They worked at a military base and were subject to military regulations and a uniformed military chain of command (Pet. App. 9a). Supervisor technicians (and, since 1985, all other technicians) were required to wear their military uniforms while on the job. See C.A. E.R. (Affidavit of Lt. Col. Thomas W. Clark). Their job responsibilities—the repair and maintenance of National Guard vehicles and equipment—were directly associated with military preparedness. And petitioner's specific complaint, alleged harassment by his supervisor and others holding superior rank, is a personnel matter involving service-related conduct and discipline that is subject to review by the base military command. See Pet. App. 9a, 11a, 21a-22a. Given these circumstances, the court of appeals was plainly correct in affirming the district court's factual determination that petitioner's suit arises from the technician's on-base military-related conduct and is therefore incident to military service. See *id.* at 9a-10a & n.8, 21a-22a.

Petitioner incorrectly contends that the court of appeals' decision conflicts with *Brown* v. *United States*, 739 F.2d 362 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985). In that case, an off-duty black National Guardsman was subjected to a mock lynching while attending an unruly Memorial Day weekend picnic held on a military base. He subsequently attempted suicide. The court held that the guardsman's mother could bring an action against the individual participants under 42 U.S.C. 1981 and 1983. But the court specifically noted that the picnic "was not sponsored by the military base nor was it related to the military mission of the base" (739 F.2d at 368) and that the activity at issue was "of a distinctly non-military nature" (*id.* at 369). The court of appeals in this case correctly distinguished *Brown* on two grounds: first, the mock lynching was less connected with on-duty activity and with the command relationship than was the harassment here (Pet. App. 13a n.10); and second, *Brown* was decided before this Court's decision in *Johnson*, which adopted a broader view of the categories of activities that may be viewed as implicating military discipline (*ibid.*). There is, in short, no direct conflict between this case and *Brown* requiring resolution by this Court.

Petitioner also points to other cases permitting, in certain circumstances, National Guard technicians to maintain actions under 42 U.S.C. 1983 for alleged constitutional violations (Pet. 21). These cases do not, however, conflict with the decision in this case, which involves an action grounded in state law. In any event, most courts have refused to permit such National Guard technicians to bring suits based on alleged constitutional violations owing to the military status of the Guard technicians. See, *e.g.*, *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 104-108 (3d Cir. 1986), cert. denied, No. 86-1382 (Oct. 5, 1987); *NeSmith* v. *Fulton*, 615 F.2d 196, 201-203 (5th Cir. 1980).

Moreover, those cases cited by petitioner as permitting Section 1983 actions were, with one inconsequential exception,[5] decided prior to this Court's decision in *Chappell* barring constitutional damages suits within the military, and therefore must be viewed as questionable authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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[5] The exception is *Johnson* v. *Orr*, 780 F.2d 386 (3d Cir.), cert. denied, 479 U.S. 828 (1986). *Orr*, however, does not assist petitioner. There the court held only that the hybrid federal/state nature of the Guard does not prevent the Guardsmen from acting under color of state law so as to meet the jurisdictional threshold of a Section 1983 action. The court made no ruling on the reviewability of the specific actions involved. Several months later, in *Jorden* v. *National Guard Bureau, supra*, the same court of appeals held that a Guard technician, like the enlisted military personnel discussed in *Chappell*, could not bring suit for damages against superior officers for military-related injuries, under 42 U.S.C. 1983, or common law causes of action. 799 F.2d at 104-108 & n.12.

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